SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., Plaintiff, v. NATIONAL FOOTBALL LEAGUE, et. al. Defendant.	Index No. 652813/2012 **E** Hon. Andrea Masley
DISCOVER PROPERTY & CASUALTY COMPANY, et al., Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652933/2012 **E** Hon. Andrea Masley

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE FOR A PROTECTIVE ORDER AND A TEMPORARY RESTRAINING ORDER

PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036
(212) 969-3000
SETH B. SCHAFLER
STEVEN H. HOLINSTAT

Counsel for Non-Parties Team Arizona Cardinals Football Club, LLC, the Chargers Football Company, LLC, the Forty Niners Football Company, LLC, The Los Angeles Rams, LLC, The Oakland Raiders, LLP, PDB Sports, Ltd. d/b/a Denver Broncos, the Jacksonville Jaguars, LLC, the Miami Dolphins, Ltd., the Buccaneers Team LLC, the Atlanta Falcons Football Club, LLC, The Chicago Bears Football Club, Inc., the

Indianapolis Colts, Inc., the New Orleans Louisiana Saints, LLC, the Baltimore Ravens Limited Partnership, Pro-Football, Inc. d/b/a Washington Redskins, the New England Patriots, LLC, The Detroit Lions, Inc., the Minnesota Vikings Football Club, LLC, the Kansas City Chiefs Football Club, Inc., the New York Jets, LLC, the Panthers Football, LLC d/b/a Carolina Panthers, the Cincinnati Bengals, Inc., the Cleveland Browns Football Company, LLC, the Philadelphia Eagles, LLC, the Pittsburgh Steelers, LLC, the Tennessee Football, Inc., the Dallas Cowboys Football Club, Ltd., Houston NFL Holdings, LP d/b/a Houston Texans, Football Northwest, LLC d/b/a Seattle Seahawks, the Green Bay Packers, Inc., the Buffalo Bills, LLC and the New York Football Giants, Inc.

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The Non-Party Teams[1] respectfully submit this memorandum of law in support of their motion for a protective order pursuant to CPLR 3103(a): (a) directing the Insurers to withdraw or stay all other proceedings they have commenced in any other jurisdiction against any of the Non-Party Teams seeking to compel compliance with the subpoenas issued to each of the Non-Party Teams (the "Subpoenas"); (b) directing the Insurers not to commence any other proceedings in any other jurisdiction to compel compliance with the Subpoenas; and (c) consolidating all proceedings relating to the Subpoenas into a single proceeding before this Court and referring resolution of the proposed consolidated proceeding to Special Referee Dolinger to set a briefing schedule to hear and resolve all issues relating to the Subpoenas. The Non-Party Teams also seek a temporary restraining order ("TRO") to temporarily enjoin the Insurers from litigating issues relating to the Subpoenas in other jurisdictions so as to maintain the status quo while this Court rules on the Non-Party Teams' motion for a protective order.

PRELIMINARY STATEMENT

This motion is necessitated by the fact that the Insurers have or are in the process of commencing and/or prosecuting 32 separate proceedings in 22 different states, *including two New York proceedings before this Court*, to compel compliance with nearly identical Subpoenas that all seek voluminous and burdensome third-party discovery from the Non-Party Teams. Litigating essentially the same discovery issues in 32 duplicative discovery proceedings across the country is incredibly inefficient, a colossal waste of judicial resources, and subjects all parties to the risk of inconsistent and potentially contradictory rulings in a multitude of jurisdictions.

[1] Unless otherwise defined in this Memorandum of Law, all defined terms have the meaning ascribed to them in the Affidavit of Irreparable Harm of Seth B. Schafler, Esq., dated April 25, 2019.

Recently, as this Court is aware, Special Referee Dolinger issued an 81-page decision addressing many of the same discovery disputes that the Non-Party Teams and the Insurers have been meeting and conferring about for the last year. In particular, Special Referee Dolinger: (a) denied the Insurers' demand that the NFL produce their Defense Files on privilege grounds; (b) denied the Insurers' demand that NFL produce additional damages-related information; (c) denied the Insurers' demand that the NFL produce any indemnification-related agreements with the Non-Party Teams and any manufacturing entities; and (d) limited the Insurers' proposed ESI search terms and custodians. All of the above rulings by Special Referee Dolinger are applicable to the Insurers' Subpoenas to the Non-Party Teams, which seek similar categories of documents.

Shortly after Special Referee's Dolinger's decision was issued, the Insurers, without any forewarning or effort to meet and confer in good faith with the Non-Party Teams in light of that ruling, began filing a mass of duplicative actions across the country to compel enforcement of the Subpoenas. To date, the Insurers have commenced 18 separate proceedings against 18 Non-Party Teams in 12 different states, and confirmed that they intend to commence separate actions against all of the remaining 14 Non-Party Teams in each of their respective local jurisdictions.

To avoid unnecessary burden and expense, waste of judicial resources and the risk of inconsistent decisions, the Non-Party teams offered to submit to the jurisdiction of this Court to adjudicate all issues relating to the Subpoenas in a single proceeding, and to meet and confer in an effort to resolve open issues. The Insurers, however, flatly rejected this proposal.

The Non-Party Teams will face immediate and irreparable injury unless the Insurers' multiple proceedings to compel compliance with the virtually identical Subpoenas are consolidated in one proceeding before this Court and the Insurers are enjoined from litigating such issues in numerous other jurisdictions. As noted, the Non-Party Teams will be forced to

litigate identical discovery issues in 32 separate court proceedings in 22 different states, and run the risk of being subjected to discovery rulings that are inconsistent from those already made in this Court and those that may be rendered in other jurisdictions, which could impact all of the Non-Party Teams. For example, if one or more Non-Party Teams are required to produce Defense File materials, it would seriously impact the privileged nature of those documents held by other Non-Party Teams and/or the NFL with whom such documents may have been shared on a common interest basis, thus mooting or severely undermining the privilege rulings of this Court.

The threat of irreparable harm is not some distant concern. For example, on April 22, 2019, the Insurers filed a discovery proceeding in Indiana state court against the Indianapolis Colts to compel compliance with the Subpoena issued to that team, and the Indiana court issued an order *that same day* requiring production of all responsive documents within 30 days – *without a hearing or providing the Indianapolis Colts with any other opportunity to be heard.* The Indianapolis Colts are now preparing papers seeking reconsideration of that ruling. In addition, a hearing was scheduled in Pennsylvania state court for April 25, 2019 in a proceeding against the Philadelphia Eagles, and only at the last minute did the Insurers agree not to pursue that motion without prejudice when that court refused to adjourn that hearing on consent of the Philadelphia Eagles and the Insurers. Moreover, there are additional imminent deadlines. Just by way of example: (a) there is a hearing currently scheduled in the Illinois action against the Chicago Bears for May 6, 2019; (b) another hearing is currently scheduled in the Pennsylvania action against the Pittsburgh Steelers for May 10, 2019; and (c) there are May 13, 2019 deadlines in the two Maryland proceedings against the Baltimore Ravens and the Washington Redskins.

Accordingly, the Non-Party Teams request that the Court issue a protective order: (a) directing the Insurers to withdraw or stay all other proceedings to compel compliance with the Subpoenas; (b) directing the Insurers not to commence any other proceedings to compel compliance with the Subpoenas; and (c) consolidating all proceedings relating to the Subpoenas to a single proceeding before this Court and referring resolution of the proposed consolidated proceeding to Special Referee Dolinger to set a briefing schedule to hear and resolve all issues relating to the Subpoenas.

Additionally, given the immediacy of the upcoming deadlines in the other actions, it is critical that the Court grant the Non-Party Teams' request for a TRO to temporarily enjoin the Insurers from litigating issues relating to the Subpoenas in other jurisdictions so as to maintain the status quo while this Court rules on the Non-Party Teams' motion for a protective order.

STATEMENT OF FACTS

The facts relevant to this application are set forth in the accompanying Affirmation of Irreparable Harm of Seth B Schafler, dated April 25, 2019.

ARGUMENT

I. The Court Should Issue A Protective Order To Prevent Unreasonable Annoyance, Expense, Embarrassment, Disadvantage, Or Other Prejudice

The Non-Party Teams respectfully request that this Court issue a protective order pursuant to CPLR 3103(a) that would consolidate all pending discovery proceedings regarding the Subpoenas into one, single proceeding before this Court. As non-parties against whom discovery is sought relevant to the Coverage Actions pending before this Court, the Non-Party Teams clearly have standing to seek such relief. *See* CPLR 3103(a) (the Court may "*on motion ... of any person from whom or about whom discovery is sought*, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device.") And such an

order is necessary and warranted to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to" the Non-Party Teams and the courts in the 32 separate proceedings in 22 different states where the Insurers have stated they intend to commence duplicative actions to compel compliance with the Subpoenas. CPLR 3103(a).

New York courts have routinely enjoined parties from proceedings in other states or countries where doing so would prevent duplicative litigation, waste judicial resources and cause the parties to incur unnecessary expenses, and potentially result in inconsistent rulings. *See, e.g.*, *IRB-Brasil Resseguros S.A. v. Protobello Int'l Ltd.*, 59 A.D.3d 366, 366-67 (1st Dept. 2009) (affirming trial court's enjoinder of party from prosecuting its action in foreign country where such would have led to a "waste of judicial resources, unnecessary legal expenses and duplicative litigation that might lead to conflicting results."); *Certain Underwriters at Lloyds, London v. Millennium Holdings LLC*, 52 A.D.3d 295, 295-96 (1st Dept. 2008) (enjoining party from pursuing parallel proceedings in Texas); *Jay Franco & Sons Inc. v. G. Studios, LLC,* 34 A.D.3d 297, 298 (1st Dept. 2006) (holding that trial court did not abuse its discretion by enjoining party from pursuing California action).

This is particularly the case in the context of non-party discovery proceedings where New York federal courts routinely require parties to litigate non-party discovery issues in the forum in which the underlying action is situated given such court's familiarity with the underlying issues and the need for that court to manage its docket. *See, e.g.*, *Cadence Pharms., Inc. v. Multisorb Techs., Inc.*, No. 16MC22G, 2016 WL 4267567, at * 5-6 (W.D.N.Y. Aug. 15, 2016) (transferring New York discovery action to compel non-party's compliance with subpoena to Delaware, where the main action was proceeding); *Fed. Deposit Ins. Co. v. Axis Reinsurance Co.*, No. 13 Misc. 380(KPF), 2014 WL 260586, at * 3 (S.D.N.Y. Jan. 23, 2014) (transferring New York

discovery action to compel non-party's compliance with subpoena to Georgia, where the main action was proceeding); *Patriot Nat'l Ins. Grp. v. Oriska Ins. Co.*, 973 F. Supp.2d 173, 175-76 (N.D.N.Y. 2013) (transferring New York discovery action to compel non-party's compliance with subpoena to Florida, where the main action was proceeding and which court is "far better positioned to hear arguments relating to whether the disputed subpoena *duces tecum* seeks documents that are relevant to the underlying action."); *Stanziale v. Pepper Hamilton LLP*, No. M8-85 (PART 1)(CSH), 2007 WL 473703, at * 5-6 (S.D.N.Y. Feb. 9, 2007) (transferring New York discovery action to compel non-party's compliance with subpoena to Delaware, where the main action was proceeding and where issues of privilege and cost-sharing were to be decided and the judge in the main action already has faimiliarity with such issues).

All of the CPRL 3103(a) factors are present. On February 26, 2019, Special Referee Dolinger issueed an 81-page ruling, which (a) denied the Insurers' demand that the NFL produce their Defense Files on privilege grounds, (b) denied the Insurers' demand that NFL produce additional information to support the NFL's damages claims against the Insurers, (c) denied the Insurers' demand that the NFL produce any indemnification-related agreements between the Non-Party Teams and any manufacturing entities, and (d) limited the Insurers' proposed ESI search terms and custodians. All of these rulings directly impact the proper scope of discovery by the Non-Party Teams under the Subpoenas, as the Subpoenas demand that the Non-Party Teams produce some of the very same categories documents that Special Referee Dolinger held that the NFL – an actual party to the Coverage Actions – is not required to produce.

Litigating the same issues with respect to the virtually identical Subpoenas against the Non-Party Teams in multiple jurisdictions will clearly result in unreasonable annoyance, expense, disadvantage, and prejudice to the Non-Party Teams and the courts in the 32 separate

proceedings in 22 different states where the Insurers have confirmed their intent to commence and/or continue prosecuting duplicative actions to compel compliance with the Subpoenas.

Moreover, such collateral litigation runs the real risk of interfering with this Court's management of its docket in the Coverage Actions. In light of Special Referee Dolinger's ruling, on March 19, 2019, the NFL and the Insurers entered into a stipulation that was So Ordered by this Court that extended various discovery deadlines, including the date for completion of all fact discovery to April 30, 2020. (Index No. 652933/2012, Dkt. No. 532 at ¶ 2.) If the Insurers are permitted to litigate discovery issues across the country, with all of the varied and separate appeals processes, it is highly unlikely that this deadline could ever be met, and this Court may be held hostage to indefinite delays necessitated by the need to wait for final discovery rulings from courts in other jurisdictions.

In the meantime, the Non-Party Teams are facing immediate and irreparable injury by having to litigate identical discovery issues in 32 separate court proceedings in 22 different states, with the real possibility of this resulting in a variety of inconsistent discovery rulings that may obligate one or more of the Non-Party Teams to have inconsistent discovery obligations, including a potential requirement to produce documents that this Court previously held were either not required to be produced (*e.g.*, indemnity and damages-related documents) or were held to be privileged (*e.g.*, the Defense Files). For example, if one or more Non-Party Teams are required to produce their Defense Files, including documents potentially shared with the NFL under a common interest privilege, it would seriously impact the privileged nature of those documents held by other Non-Party Teams and/or the NFL, itself.

In short, there is no legitimate reason not to consolidate all of the Insurers' proceedings to compel complaince with the Subpoenas before this Court, as (a) this Court has the most

knowledge of the underlying issues involved in the Coverage Actions pending before it, (b) this Court has already made rulings on several discovery-related issues, certain of which will directly impact on the proper scope of the Subpoenas, and (c) consolidation will conserve judicial resources, avoid duplicative and wasteful litigation and avoid potentially inconsistent rulings on the same discovery issues. The only potential reason for the Insurers to reject consolidation, other than to burden and harass the Non-Party Teams, is their hope that by relitigating the same issues before different courts, they will produce more advantageous discovery rulings in other jurisdictions less familiar with this matter than they or will receive in this Court. This Court, however, should not countenance such improper forum-shopping and abusive litigation tactics.

II. A TRO Is Necessary To Avoid Inconsistent Discovery Rulings That May Undermine This Court's Prior Discovery Rulings

The Non-Party Teams easily satisfy the traditional prerequisites for injunctive relief: (1) a likelihood of success on the merits; (2) irreparable injury if the injunction is not granted; and (3) a balance of the equities in their favor. *See* CPLR 6301; *Nobu Next Door, LLC, v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005); *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990); *J.A. Preston Corp. v. Fabrication Enters., Inc.*, 68 N.Y.2d 397, 406 (1986); *Invesco Institutional (N.A.), Inc. v. Deutsche Inv. Mgmt. Ams., Inc.*, 74 A.D.3d 696, 697 (1st Dept. 2010).

A. The Non-Party Teams Will Be Irreparably Harmed By Having To Litigate The Same Discovery Issues In 32 Separate Proceedings In 22 Different States

For the reasons stated in Point I, above, the Non-Party Teams have established that they will be irreparably harmed absent this Court granting the injunctive relief requested in their motion. For the same reasons, the Non-Party Teams have shown that a TRO should be entered because "immediate and irreparable injury, loss or damages will result unless [the Insurers are] restrained before a hearing can be had." CPLR 6313.

B. The Non-Party Teams Are Likely To Succeed On Their Objections To The Subpoenas

To demonstrate a likelihood of success on the merits, the Non-Party Teams need only make a *prima facie* showing of their right to relief. *Invar Int'l, Inc. v. Zorlu Enerji Elektrik Uretim Anonim Irketi Sirketi*, 86 A.D.3d 404, 405 (1st Dept. 2011); *Unique Laundry Corp. v. Hudson Park N.Y. LLC*, 55 A.D.3d 382, 383 (1st Dept. 2008); *Terrell v. Terrell*, 279 A.D.2d 301, 303 (1st Dept. 2001); *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604, 605 (2d Dept. 2004) ("[a]ll that must be shown is the likelihood of success; conclusive proof is not required.").

While the Non-Party Teams have asserted multiple valid objections to the Subpoenas, to avoid burdening the Court, the Non-Party Teams have limited their discussion to just three of those objections.

First, Requests Nos. 13-18 and 22-27 seek all documents and communications regarding workers compensation and other claims against the NFL and/or any of the Non-Party Teams relating to any Alleged Brain Injuries, including the NFL's and the Non-Party Teams' analysis of such claims, including, *inter alia*, (a) any potential or actual lawsuits by any current or former player involving Alleged Brain Injuries; (b) the costs incurred to defend and/or settle the MDL Action and the Class Action Settlement; (c) the approval of the Class Action Settlement; and (d) any analysis of the NFL players' claims, the defenses to such claims, the valuation of such claims, and the potential or actual settlement of such claims. In short, the Insurers are seeking all damages-related documents relating to such claims, as well as privileged defense files.

However, these are precisely the categories of documents that Special Referee Dolinger ruled need not be produced by the NFL in the Coverage Actions. For example, Special Referee Dolinger denied the Insurers' demand that the NFL produce their Defense Files on privilege grounds (Index No. 652813/2012, Dkt. No. 509 at 6-25). And, he denied the Insurers' demand

that NFL produce additional damages-related information, including information relating to "claims filed under the MDL settlement agreement and payments made, as well as defense costs," because the NFL had been "providing the [Insurers] with, among other documentation, 'detailed summaries of settlement registration data and all settlement claim resolution and claim payment details' prepared by the settlement claims administrator" and the NFL further "agreed to produce on a periodic basis the back up documentation for the spreadsheets that had been and are still being provided on a continuing basis covering claim resolution and claim payment details in a claimant specific format." (Index No. 652813/2012, Dkt. No. 509 at 54-55.) Special Referee Dolinger held that the NFL's commitment to providing such materials satisfied its "obligation to provide specific settlement damages information at this stage of the litigation" (Index No. 652813/2012, Dkt. No. 509 at 55.)

If the NFL – a party to the Coverage Actions – is not required to produce the foregoing documents, then the Non-Party Teams are likely to succeed on their objections to producing the same types of documents.

Second, Requests Nos. 29-30 seek all documents and communications regarding any indemnity agreements between the Non-Party Teams and the NFL. Again, Special Referee Dolinger denied the Insurers' demand that the NFL produce any indemnification-related agreements between the Non-Party Teams based on the NFL's representation that "there is no indemnification agreement that would be pertinent to the current case, and that any obligations of the [Non-Party Teams] to indemnify the [NFL] under any scenario are reflected in the by laws of the [NFL], which have been produced to the carriers, along with the [NFL's] constitution" (Index No. 652813/2012, Dkt. No. 509 at 56). Accordingly, if the NFL is not required to produce such

documents, then the Non-Party Teams are likely to succeed on their objections to producing these documents.

Third, Requests Nos. 1-12, 19-21, and 31-34 seek all documents and communications concerning any Alleged Brain Injuries. Based on the allegations and claims asserted in the MDL Action, the only relevant information is the NFL's knowledge concerning what the Insurers define as Alleged Brain Injuries. Thus, to the extent information was not conveyed to the NFL, it is irrelevant to the Coverage Action. Moreover, if such information was conveyed by one or more of the Non-Party Teams to the NFL, then it is clearly in the NFL's possession, and thus unnecessarily burdensome. Indeed, the Non-Party Teams proposed to search for and produce those documents in the Non-Party Teams' possession that the Insurers claimed were missing from the NFL's production, but the Insurers inexplicably rejected this offer.

C. The Balance Of Equities Favor The Non-Party Teams

The balancing of the equities also favors the Non-Party Teams, as consolidating the 32 separate proceedings in one single forum before the Court most knowledgeable about the underlying action will conserve judicial resources, avoid duplicative and wasteful litigation and avoid potentially inconsistent rulings on the same discovery issues. Moreover, there is no conceivable harm to the Insurers by granting the relief requested by the Non-Party Teams. Indeed, providing the Insurers with an ability to avoid this Court's prior discovery rulings by getting multiple bites at the apple in several other jurisdictions is hardly equitable.

D. The Non-Party Teams Should Not Be Required To Post Any Undertaking

The purpose of an undertaking is to cover the "damages and costs which may be sustained by reason of the injunction" if it is determined that the movant was not entitled to the injunction. CPLR 6312(b). Here, consolidation of all discovery proceedings before this Court cannot conceivably result in the Insurers – parties to the very Coverage Actions pending before

this Court – suffering any damages or costs by reason of the injunction. Alternatively, if an undertaking is required, it should be set in a minimal amount.

CONCLUSION

For all of the foregoing reasons, the Non-Party Teams respectfully request that the Court issue a protective order: (a) directing the Insurers to withdraw or stay all other proceedings to compel compliance with the Subpoenas; (b) directing the Insurers not to commence any other proceedings to compel compliance with the Subpoenas; (c) consolidating all proceedings relating to the Subpoenas to a single proceeding before this Court and referring resolution of the proposed consolidated proceeding to Special Referee Dolinger to set a briefing schedule to hear and resolve all issues relating to the Subpoenas, and (d) granting the Non-Party Non-NY Teams such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 25, 2019

PROSKAUER ROSE LLP

By: _____

John E. Failla
Seth B. Schafler
Steven H. Holinstat
Eleven Times Square
New York, NY 10036-8299
(212) 969-3000

Counsel for Non-Parties Teams

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I certify that this affirmation complies with the 7,000-word limit under Commercial Division Rule 17. This computer generated memorandum of law was prepared using Microsoft Word, and based on Microsoft Word's word count function, the total number of words in this memorandum of law, including of point headings and footnotes and exclusive of the caption and signature block is 3,591.

Dated: April 25, 2019

SETH B. SCHAFLER